IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 93 OF 1988.

The Boots Company (India) Ltd. ... Applicant.

V/s.

Commissioner of Income Tax. ... Respondent.

J.D.Mistry i/b. Crawford Bayley & Co.
for the applicant.

Ashok Kotangale i/b. K.C.Sidhwa
for the respondent.

CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.

DATED : 27th June 2005.

P.C. :

. This reference arises out of two reference applications, one made by the assessee and other made by the revenue. By this reference under section 256 of the Income-tax Act, 1961, the Income Tax Appellate Tribunal has referred the following questions of law for the opinion of this Court:

2. The questions referred at the instance of the assessee are as under:

1. Whether, on the facts and in the circumstances of the case, reimbursement of medical expenses to the directors by the assessee company is part of

directors salary for the purpose of section 40A(5)/40(C)?

2. Whether, on the facts and in the circumstances of the case, house rent allowance paid to the employees by the assessee company is part of salary for the purpose of sec. 40A(5)?

3. Whether, on the facts and in the circumstances of the case, house rent allowance paid to the employees and exempt in their hands is includible as part of salary for the purpose of sec.40A(5)?

4. Whether sur-tax liability is deductible in determining the assessable income of the assesse?

. The questions referred at the instance of the revenue are as under:

5. Whether provisions of sec. 40(c) and not those of sec. 40A(5) are applicable in respect of payment of salary and perquisites to the employee directors by the assessee company?

6. Whether proportionate salary of an employee pertaining to period of his tour outside India constituted expenditure or allowance within the meaning of clause (b)(i) of second proviso to section 40A(5) and falls outside the ambit of section 40A(5)?

7. Whether, plant and machinery commissioned in the middle of the year were entitled to extra shift allowance inclusive of the period during which plant and machinery were not in a position to be brought into use at all?

3. Heard learned counsel for the parties. Perused reference proceedings.

4. Mr.Mistry, learned counsel for the assessee fairly submitted that question No.1 is covered by the decision of the Apex Court in the case of **Commissioner of Income-tax v. Mafatlal Gangabhai & Co. P.Ltd.**, (1996) 219 ITR 644 and has to be answered in the affirmative i.e. in favour of the revenue and against the assessee.

5. Mr.Mistry submits that question No.2 is also covered by the judgment of this Court in the case of

C.I.T. v. British Bank of Middle East, (2004) 265 ITR 31 and has to be answered in the affirmative i.e. in favour of revenue and against the assessee.

6. So far as third question is concerned, in view of the decision of the supreme Court in case of **Mafatlal Gangabhai** (supra) followed by this Court in the case of **British Bank of Middle East** (Supra), this question is answered in favour of the Revenue and against the assessee.

7. He again fairly conceded that question No.4 is covered by the judgment of the Apex Court in the case of **Smith Kline and French (India) Ltd. v. C.I.T.** (1996) 219 ITR 581 and has to be answered in negative i.e. in favour of revenue and against the assessee.

8. Learned counsel for the parties agreed that in view of the decision of this Court in the case of **C.I.T. v. Hico Products Pvt.Ltd.(No.1)**, (1993) 201 ITR 567 and Scindia Steam Navigation Co.Ltd. v. C.I.T., 211 ITR 747, question No.5 has to be answered in the affirmative i.e. in favour of assessee and against the revenue.

9. They further agreed that question Nos.6 is covered by the decision of the Apex Court in the case of **C.I.T. v. Continental Construction Ltd.**,

230 ITR 485 (SC) and the decisions of this Court in **Colour Chem Ltd. v. C.I.T.**, 238 ITR 171 and **C.I.T. v. Indo Oceanic Shipping Co.Ltd.**, 247 ITR 247 and the same has to be answered in the affirmative i.e. in favour of the assessee and against the revenue.

10. So far as question No.7, referred at the instance of Revenue is concerned, learned counsel for the the applicant - assessee submits that in view of the judgment of the Apex Court in the case of **UCO Bank v. C.I.T.** (1999) 237 ITR 889 (SC); wherein it is held that circular issued by the Central Board of Direct Taxes (C.B.D.T.) has to be followed. Since the Tribunal, in the instant case, has followed the circular issued by C.B.D.T., this question has to be answered in the affirmative i.e. in favour of assessee and against the revenue.

11. We answer the questions accordingly. Reference stands disposed of with no order as to costs.

(A.S.AGUIAR, J.) **(V.C.DAGA, J.)**